

TEXAS DEPARTMENT OF LICENSING AND REGULATION



Executive Offices
P.O. Box 12157 Austin, Texas 78711 www.license.state.tx.us (512) 463-3173 FAX (512) 475-2874

June 5, 2000

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OPINION COMMITTEE

Via Interagency Mail

The Honorable John Cornyn
Texas Attorney General
ATTN: Opinions Committee
P.O. Box 12548
Austin, TX 78711-2548

FILE # ML-41453-00
I.D. # 41453

Re: Did SB 1955, which transferred the water well driller and pump installer programs from the TNRCC to the TDLR, transfer the authority to enforce rules promulgated under the TNRCC's authority?

Dear General Cornyn:

Senate Bill 1955, 75th Legislature, 1997, transferred the Water Well Drillers (WWD) and Pump Installers (PI) programs under Chapters 32 & 33 of the Texas Water Code (TWC) from the Texas Natural Resource Conservation Commission (TNRCC) to the Texas Department of Licensing and Regulation (TDLR) effective September 1, 1997.

From September 1, 1997 to January 3, 1999, the TDLR operated the regulatory programs under rules adopted by the TNRCC. On January 3, 1999, the TDLR adopted rules for the WWD and PI programs, and the TNRCC's rules were administratively withdrawn on February 4, 1999.

Senate Bill 1955 did not specifically transfer administrative rules to the TDLR.

My question is:

Does the TDLR have jurisdiction to require water well drillers and pump installers to adhere to standards set by TNRCC's administrative rules from September 1, 1997 to January 3, 1999?

We believe the general transfer language in SB 1955 authorized the TDLR to enforce standards adopted by the TNRCC during the transferring time period. An opinion from your Honor will clarify this issue for our license holders.

Section 19(b) of SB 1955 states:

All *powers and duties* of the Texas Natural Resource Conservation Commission under Chapters 32 & 33, Water Code, and all obligations, *rights*, contracts, records, real or personal property, and personnel of the commission *relating* to those *powers and duties* are transferred to the Texas

Department of Licensing and Regulation. (Emphasis added)

Prior to the effective date of SB 1955 (September 1, 1997), sections 32.010, 32.011, 33.008, 33.009 of the TWC Chapters 32 & 33 authorized the TNRCC to revoke, suspend, probate, or reprimand licensees and/or assess administrative penalties to persons who failed to comply with the statutes or rules adopted by the TNRCC. It is TDLR's position that the power, duty and right to assess sanctions or penalties for rule violations were transferred to TDLR in SB 1955, section 19(b) along with the administrative rules.

Sections 6 & 14 of SB 1955 require the TDLR to promulgate rules, however those sections do not mandate a time period to adopt rules. If the TDLR had to immediately adopt rules for well drillers and pump installers, it would be impossible to do so simultaneously with the effective date of SB 1955.¹

The Department is required to adopt rules in accordance with Chapter 2001, Government Code² with advice and comment from the TNRCC³. Subchapter B of Chapter 2001, Government Code (Rule making) requires at a minimum, 30 days notice of an agency's intent to adopt rules.⁴ Rules do not take effect until 20 days after the date on which it is filed with the Secretary of state.⁵ The TDLR Commission must approve all rules assessing license and exam fees⁶ and the TDLR Commission meets quarterly. If a public hearing becomes necessary as required by §2001.029 Government Code, the procedure can be much longer. In this instance, we were required to conduct a public hearing and did so.⁷

We believe the legislature intended for the TDLR to utilize TNRCC's rules for the water well driller and pump installer programs during the transition stage between state agencies. Representative Gary Walker, who sponsored the House Bill that transferred the programs from TNRCC to TDLR, wrote the TNRCC's Chairman and stated it was his intent to transfer all personnel, duties, and functions including the entire 30 Texas Administrative Code chapters 238 and 340 to the TDLR.⁸ Although one legislator's opinion does not bind the entire legislature, the House sponsor's intent is informative.

¹ The Texas Legislature has taken care of this dilemma. SB 382, acts of the 76th Legislature added §2001.006 to the Government Code which authorizes state agencies to adopt rules prior to the implementation date of a law, effective September 1, 1999.

² TWC §§ 32.009(c) & 33.007 (c)

³ The department, with advice and comment from the Texas Natural Resource Conservation Commission shall adopt rules as necessary to enforce this chapter, including rules governing applications for a license, qualifications of applicants, standards of conduct for licensed drillers including marking of well drilling rigs and equipment, and rules governing procedure and practice before the department. TWC, § 32.009 (a) The department shall adopt rules as necessary to enforce this chapter. TWC, § 33.007(a)

⁴ Government Code, §2001.023(a)

⁵ Government Code, §2001.036

⁶ Occ. Code, Chapter 51, §51.202(a)

⁷ Government Code, §2001.029 (b)(3), public hearing request made by an association having at least 25 members; hearing held on October 5, 1998.

⁸ Letter from Representative Gary Walker July 7, 1998 to Chairman Barry McBee

An example of this sisyphian problem is the receiving agency's ability to renew licenses during the transition period. TWC Section 33.003(h) states the TDLR shall by rule, set licensing fees to cover the costs of administering the chapter. When the program transferred from TNRCC, all licenses expired on August 31⁹. Arguably, if the TDLR did not have authority to enforce rules promulgated under the TNRCC on September 1, 1997, then those who renewed their licenses on or shortly after September 1, 1997 did not have to pay the renewal fee as set by TNRCC's administrative rules. Since prior to September 1, 1997, the TNRCC had the power, duty and right to assess licensing fees, the TDLR should have had authority to assess fees on September 1, 1997.

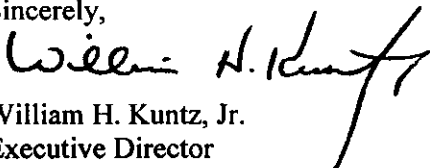
The collection of licensing fees in 1997 and 1998 is now a moot point. The issue we are faced with now is whether standards set by TNRCC rule are applicable to wells drilled between September 1, 1997 and January 3, 1999. The Department performs random installation inspections and investigates consumer complaints, and often, a consumer complaint does not arise until years after the initial drilling. It is to these types of complaints the department desires to respond with an investigation and administrative proceeding, if necessary.

We are aware of other legislative acts transferring programs from one agency to another, that recite a transfer of administrative rules,¹⁰ but believe the general language transferring rights, obligations and duties encompasses the right, duty and obligation to enforce rules adopted by the TNRCC.

Please contact TDLR General Counsel, Theda Lambert at 512/463-3306 or electronically at theda.lambert@license.state.tx.us if you have any questions regarding this opinion request.

Thank you.

Sincerely,



William H. Kuntz, Jr.
Executive Director

attach: SB 1955

July 7, 1998 - letter from Representative Gary Walker to TNRCC

⁹ TWC, §§ 32.002(e) & 33.002(d)

¹⁰ The rules of the TDLR relating to the administration and enforcement of the Texas Manufactured Housing Standards Act are continued in effect as rules of the TDHCA until amended or repealed by that department. TEX. LABOR CODE ANN. 5221f (Vernon Supp. 1999) (historical note). And many other transferring bills mention specifically that rules are transferred.